

MAR 17 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HERMENEGILDO HERRERA-
SANCHEZ,

Defendant - Appellant.

No. 04-30113

D.C. No. CR-03-00030-SEH

MEMORANDUM and ORDER *

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted March 8, 2006**

Before: CANBY, BEEZER and KOZINSKI, Circuit Judges.

Hermenegildo Herrera-Sanchez appeals from his guilty plea conviction and the 63-month sentence imposed for illegal re-entry after deportation, in violation of 8 U.S.C. § 1326.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), counsel for Herrera-Sanchez has filed a brief stating there are no grounds for relief, and a motion to withdraw as counsel of record. Herrera-Sanchez has not filed a pro se supplemental brief.

We have conducted an independent review of the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 83 (1988). We affirm the conviction. Appellant was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory. “We have held that ‘where the district court did not treat the sentencing guidelines as advisory but the defendant’s sentence was not enhanced by extra-verdict findings,’ a nonconstitutional sentencing error has occurred.” *United States v. Brown*, 417 F.3d 1077, 1080 (9th Cir. 2005) (per curiam), citing *United States v. Ameline*, 409 F.3d 1073, 1084 n.8 (9th Cir. 2005) (en banc). Appellant shall notify the court within 14 days of the filing date of this memorandum disposition if appellant wants to pursue an *Ameline* remand. *See id.* at 1084. If appellant does not respond to this inquiry, the district court’s sentence shall be affirmed.

The conviction is **AFFIRMED**.

BRIEFING IS ORDERED with respect to the sentence.